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Article (Published Version)

McGillivray, Donald (2013) Water rights and environmental damage: an enquiry into stewardship in the context of abstraction licensing reform in England and Wales. *Environmental Law Review*, 15 (3). pp. 205-224. ISSN 1461-4529

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Citation: 15 Env'tl. L. Rev. 205 2013



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Water Rights and Environmental Damage: An Enquiry into Stewardship in the Context of Abstraction Licensing Reform in England and Wales

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Keywords: property stewardship, water rights, abstraction, Water Framework Directive, Water Act 2003

Abstract: The intersection of private rights and public responsibilities lies at the heart of both environmental and property law. This article considers this intersection in the context of debates about property ownership and notions of environmental stewardship. These form the background to considering shifts in water rights law in England and Wales and the extent to which they can be said to exhibit or exemplify a shift towards stewardship. Section 27 of the Water Act 2003 is analysed as this authorises revocation or variation of an abstraction licence without compensation in order to protect waters or aquatic flora and fauna from 'serious damage'. Because regulatory abstraction licensing is a modern overlay on the common law, but one which has protected many existing abstractors from restrictions on their rights, section 27 might be regarded as strongly indicative of a stewardship shift in water rights. However, I argue that greater attention needs to be paid to the wider context within which this provision operates before it can be deployed as an unambiguous pro-stewardship example. I suggest that a range of related regulatory, economic and interpretive factors are likely to lead, in practice, to limited direct legal intrusion on private water rights. The case of section 27 serves as a 'bottom up' example of a need for circumspection about whether any specific formal, doctrinal reform is likely to exemplify, or support, a shift towards stewardship in water or property law, and draws out some of the complex relations between public and private interests that characterise stewardship.

INTRODUCTION

The intersection of private rights and public responsibilities lies at the heart of both environmental and property law. Amongst numerous examples of conflict between the two, exposing students¹ to Hardin's 'The Tragedy of the Commons',² and to its theoretical and

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1 E.D. Elliott, 'The Tragi-Comedy of the Commons: Evolutionary Biology, Economics and Environmental Law' (2001) 20 *Virginia Environmental Law Journal* 17, 17–18: 'In American environmental law, our reigning creation myth comes from [Hardin] ... Excerpts from Hardin's article have been featured prominently in many environmental law casebooks. At an American Association of Law Schools seminar on teaching environmental law in 1983, every professor of environmental law in attendance said he or she used the "Tragedy of the Commons" as a paradigm for explaining environmental law'.

2 (1968) 162 *Science* 1243.

practical shortcomings,³ is a common way in to teaching environmental law, helping to reveal the tensions both between private rights and preferences and more collective interests, and between law on the books and law in action. And recent work has argued that it is the shared, public interconnectedness of natural resource use which is a defining feature of environmental law.⁴

Both of these elements – the centrality of shared and public interests – are also hallmarks of the ‘stewardship’ notion in property. As Tarlock has argued, ‘Environmental law can ... be explained as an effort to institutionalize stewardship obligations’.⁵ The increasing body of literature on stewardship as an organising concept for conceiving of property departs from a focus on property ‘owners’ and their ‘rights’ (a liberal approach), emphasising instead responsibilities towards others and the importance of broader public interests in land (but problematising our understanding of private and public in the process). This literature, however, has largely developed its arguments at a doctrinal level, with specific – and often environmental – developments being marshalled to argue in favour of the importance of adopting a stewardship approach or to try to explain the ways in which it can already be said to have emerged in legal doctrine.⁶

Beyond the UK, there has been greater discussion of water rights in a property law context (and vice versa). Trigger points for this have included water privatisation; public trust doctrine recognition and litigation (for example, in the US and post-Apartheid South Africa⁷); and broader constitutional reforms.⁸ The focus of much of this body of scholarship has tended to come from an environmental resource management perspective – focusing on why private rights may need to be regulated so that wider public interest goals can be pursued – or from a narrower enquiry into water ownership,⁹ though there have been important contributions probing what water rights law reform might say about developments in property law, including work by Horwitz, Rose, Freyfogle, Arnold and

3 E. Ostrom, *Governing the Commons* (Cambridge University Press: Cambridge, 1990) and associated literature. A personal favourite is O.R. Young, ‘Land Use, Environmental Change, and Sustainable Development: The Role of Institutional Diagnostics’ (2011) 5 *International Journal of the Commons* 66.

4 A. D. Tarlock, ‘The Future of Environmental Rule of Law Litigation’ (2002) 19 *Pace Environmental Law Review* 575, 577.

5 T. Aagard, ‘Environmental Law as a Legal Field: An Inquiry in Legal Taxonomy’ (2010) 95 *Cornell Law Review* 221.

6 Notable contributions include W. Lucy and C. Mitchell, ‘Replacing Private Property: The Case for Stewardship’ (1996) 55(3) *Cambridge Law Journal* 566 (land access); D.W. McKenzie Skene, J. Rowan-Robinson, R. Paisley and D. J. Cusine, ‘Stewardship: From Rhetoric to Reality’ (1999) 3(2) *Edinburgh Law Review* 151 (land access and land reform); Kevin Gray *passim* (land access; planning and environmental regulation generally); J. Morgan, ‘Leases: Property, Contract or More?’ in M. Dixon (ed.), *Modern Studies in Property Law: Volume 5* (Hart Publishing: Oxford, 2009) (leases); C. P. Rodgers, ‘Nature’s Place? Property Rights, Property Rules and Environmental Stewardship’ (2009) 68(3) *Cambridge Law Journal* 550 (nature conservation and agri-environmental law); S. Pascoe, ‘Social Obligation Norm and the Erosion of Land Ownership?’ (2012) 6 *Conveyancer and Property Lawyer* 484 (land access, hunting, housing).

7 D. Takacs, ‘The Public Trust Doctrine, Environmental Human Rights and the Future of Private Property’ (2008) 16 *New York University Environmental Law Journal* 711 (arguing for the value in the synergy between the public trust doctrine and environmental human rights); L. Godden, ‘Water Law Reform in Australia and South Africa: Sustainability, Efficiency and Social Justice’ (2005) 17 *Journal of Environmental Law* 181, 198.

8 See Godden, above n. 7 at 181.

9 S. B. Zellmer and J. Harder, ‘Unbundling Property in Water’ (2007–8) 59 *Alabama Law Review* 679, 691–99.

Getzler.¹⁰ Freyfogle's work, in particular, is notable for advocating wider environmental responsibilities.¹¹ Water rights, however, have featured hardly at all in the UK-based stewardship literature.¹²

OBJECTIVES AND APPROACH

This brief overview sets the context for the argument which is developed in this article. The reason for this is that the aim of this article is distinctly different from most contributions to the stewardship debate. Its ambition is to call for greater attention to the practical operation of legal reforms which appear to exemplify stewardship concerns. The objective is neither to test the stewardship thesis doctrinally nor directly, but to explore the operation of – in this case statutory – legal provisions which display stewardship qualities and to reach an assessment of the extent to which they may be used in the debate. The hope is that this may enrich our critical understanding of stewardship as an operative concept. Hence, while the workshop at which an earlier version of this article was presented aimed to 'rethink water rights through stewardship', this article tries, from a broadly socio-legal perspective, to rethink – or, perhaps more accurately, to reassess – stewardship through a specific water rights example.

To be clear, then, my focus is not in contributing to certain important debates in property law in which the concept of stewardship has been prominent, for example (i) as between those who argue that 'property' follows from bare legal entitlements¹³ and those who stress that property is more a matter of gradation, dependent on determinations about resource allocation;¹⁴ or (ii) as between exclusion and social obligation theories of property as a concept.¹⁵

For the purposes of the analysis, a working definition of stewardship is, necessarily, used. However, this should not mask the wider point that, while stewardship may seem to have an identifiable core meaning, it also has much fuzziness to it. So, while I try to avoid being drawn too heavily into the stewardship debate in property law and use 'stewardship' as a

10 M. Horwitz, *The Transformation of American Law 1780–1860* (Harvard University Press: Cambridge, 1977); C. M. Rose 'Energy and Efficiency in the Realignment of Common Law Water Rights' (1990) 19 *Journal of Legal Studies* 261; E. Freyfogle, 'Context and Accommodation in Modern Property Law' (1988–89) 40 *Stanford Law Review* 1529; C. A. Arnold, 'Water Privatization Trends in the United States: Human Rights, National Security, and Public Stewardship' (2009) 33 *William and Mary Environmental Law and Policy Review* 785, 828–849. For significant criticism of Horwitz and Rose see J. Getzler, *A History of Water Rights at Common Law* (Oxford University Press: Oxford, 2004).

11 See Freyfogle, *ibid.* ('If property law does develop like water law, it will increasingly exist as a collection of use-rights, rights defined in specific contexts and in terms of similar rights held by other people. Property use entitlements will be phrased in terms of responsibilities and accommodations rather than rights and autonomy. A property entitlement will acquire its bounds from the particular context of its use, and the entitlement holder will face the obligation to accommodate the interests of those affected by his water use. If I am right, property law future will be a version of water law present': *ibid.* at 1530–1; 'a water user is a steward of a certain water flow and has the responsibility to use that water in a way that produces socially desirable benefits': *ibid.* at 1543).

12 See above n. 5. However, note M. Shephard and R. Norer, 'Increasing Water Stewardship Responsibility: Water Protection Obligations and Watershed Management Policy Affecting Farmers in Lucerne, Switzerland' (2013) 15(2) *Environmental Law Review* 121.

13 See J. W. Harris, *Property and Justice* (Oxford University Press: Oxford, 1996). J. Penner, *The Idea of Property in Law* (Oxford University Press: Oxford, 1997).

14 K. Gray and S. F. Gray, 'The Idea of Property in Land' in S. Bright and J. Dewar (eds), *Land Law: Themes and Perspectives* (Oxford University Press: Oxford, 1998).

15 On this debate see J. B. Baron, 'The Contested Commitments of Property' (2010) 61 *Hastings Law Journal* 917; J. A. Lovett, 'Progressive Property in Action: The Land Reform (Scotland) Act 2003' (2011) 89(4) *Nebraska Law Review* 743–750.

shorthand for a general conceptual orientation, the analysis inevitably explores tensions within ideas of stewardship and of property.

In terms of approach and sceptical orientation, perhaps the closest example is Mitchell's work on the so-called 'right to roam' over registered common land and open countryside, which was brought into law in England and Wales under the Countryside and Rights of Way Act 2000, implemented by a process of mapping (under section 4(1)) which was completed in 2005. It might be said that regardless of the outcome of this process and of the specific rights afforded both to recreational users and to landowners, the opening up of certain land for public recreational access without payment of compensation was primarily evidence of a significant shift in how at least certain kinds of property rights are to be understood. However, while there is undoubtedly some truth in this, and this particular reform is widely cited as an example of a stewardship approach,¹⁶ there is also something in Mitchell's argument that a secondary consequence of this land access law reform is that in many ways it actually served to entrench certain aspects of landowner rights, and placed landowners in a stronger (public law) position relative to access users.¹⁷

The specific example used is the issue of restricting water rights in the interests of ecological water quality, driven in part by the EU Water Framework Directive (WFD).¹⁸ Section 27 of the Water Act 2003, which came into force in 2012, enables, where the Secretary of State is satisfied that this is necessary, rights to be varied or restricted without compensation in order to protect waters or aquatic flora and fauna from 'serious damage'. Because regulatory abstraction licensing is a modern overlay on the common law, but one which has protected many existing abstractors from restrictions on their rights, section 27 might be regarded as strongly indicative of a stewardship shift in water rights, removing – for those who prefer the bundle of sticks approach – the stick marked 'right to cause serious aquatic ecological harm' from the bundle held by the water rights owner.¹⁹ Unlike land access, however, the focus is community ecological obligations rather than duties owed to others. Section 27 addresses prevention of harm rather than more positively formulated stewardship responsibilities, and therefore might be seen as at the less contentious end of the stewardship spectrum,²⁰ and hence a particularly good example to take.

STRUCTURE

This article considers debates about property ownership and notions of environmental stewardship, including discussion of payment for public goods. It considers modern regulatory law on water abstraction, in particular Part II of the Water Resources Act 1991, in the context both of the prior common law rights and the impact of the EU Water Framework Directive. This then leads on to a discussion of section 27 of the Water Act 2003 and a critical analysis of what this provision may tell us about the operation of

16 See Lucy and Mitchell, above n. 6; McKenzie Skene, Rowan-Robinson, Paisley and Cusine, above n. 6; Gray *passim*; Pascoe, above n. 6; J. L. Anderson, 'Countryside Access and Environmental Protection: An American View of Britain's Right to Roam' (2007) 9 *Environmental Law Review* 241. See similar discussion in relation to land access reform in Scotland: see Lovett, above n. 15.

17 J. Mitchell, 'What Public Presence? Access, Commons and Property Rights' (2008) 17 *Social and Legal Studies* 351.

18 Directive 2000/60/EC establishing a framework for Community action in the field of water policy [2000] OJ L 327/1.

19 E.T. Freyfogle, 'Ownership and Ecology' (1993) 43 *Case Western Law Review* 1269, 1285 ('the right to degrade cannot be a stick in the owner's bundle of entitlements'). See also R. J. Goldstein, 'Green Wood in the Bundle of Sticks: Fitting Environmental Ethics and Ecology into Real Property Law' (1998) 25 *British Columbia Env Affairs Law Review* 347.

20 See Shepherd and Norer, above n. 12.

stewardship, followed by the conclusion. I suggest that a range of regulatory, economic and interpretive factors are likely to lead in practice to limited direct legal intrusion on private water rights. The case of section 27 may serve both as a 'bottom up' example of a need for circumspection about whether any specific formal, doctrinal reform exemplifies, or supports, a shift towards stewardship in water or property law, as well as drawing out some of the complex relations between public and private interests than characterise stewardship.

STEWARDSHIP

STEWARDSHIP: A CORE MEANING ...

In English law there is no right in water itself, and riparian rights are regarded as rights to land covered with water.²¹ Hence, as discussed in more detail below, there is no common law right to receive any particular flow of surface water and, in the case of groundwaters, in theory at least, no right to receive even a reasonable flow.²² Nor, however, is there any common law remedy for damaging the unowned environment, at least where ecological damage is not linked to a recognised property right.²³

Responses to this are likely to vary. In terms of a private law response, some might see the solution as lying in reform of the law of tort, for example to allow claims, unconnected with property rights, on behalf of 'nature'.²⁴ For others, the consequence of this is a broader need to reorder property rights, justified by stewardship concerns.²⁵ Some go further and argue that nothing less than replacing private property with stewardship is called for.²⁶ Some point to existing examples of stewardship, but do not go so far as to argue for stewardship as a recognised facet of property generally,²⁷ while for others this model of property already exists.²⁸

21 *Thames Heliports plc v London Borough of Tower Hamlets* (1997) 74 P and CR 164, at 177, 179. See K. Gray and S. F. Gray, *Elements of Land Law* 5th edn (Oxford University Press: Oxford, 2009) 51. Gray and Gray describe this as a 'doctrinal embarrassment', though they give no reason for this conclusion.

22 *Bradford Corporation v Pickles* [1895] AC 587, a decision which it is very doubtful would be supported today, both because of developments in groundwater science and a less liberally individualistic approach to adjudication.

23 *Granby (Marquis) v Bakewell UDC* (1923) 87 JP 105.

24 C. D. Stone, 'Should Trees Have Standing? – Towards Legal Rights for Natural Objects' (1972) 45 *Southern California Law Review* 450; *British Columbia v Canadian Forest Products Ltd* [2004] 2 SCR 74 ('I do not accept that there is anything so peculiar about "environmental damages" as to disqualify them from consideration by the Court ... there is no reason to neglect the potential of the common law, if developed in a principled and incremental fashion, to assist in the realization of the fundamental value of environmental protection.' [155])

25 J. Karp, 'A Private Property Duty of Stewardship: Changing our Land Ethic' (1993) 23 *Environmental Law* 735. R. Goldstein, *Ecology and Environmental Ethics: Green Wood in the Bundle of Sticks* (Ashgate: Aldershot, 2004) 151 ('[L]andowners have a duty to maintain the environmental context of the land in relation to the ecosystem to which it belongs. Environmental context is defined using the science of ecology. Green wood creates a rebuttable presumption that action by a landowner that will affect the environmental context is prohibited'.)

26 Lucy and Mitchell, above n. 6.

27 M. Davies, 'Persons, Property and Community' (2012) 2(2) *feminists@law* 16 ('Stewardship has not been explicitly recognised as a facet of property, though it is making its way into various areas of law which deal with the environment', citing recent Australian examples); Shepherd and Norer, above n. 12.

28 See Gray and Gray, above n. 21 at 109–114 (synthesising previous work); C. P. Rodgers, *The Law of Nature Conservation* (Oxford University Press: Oxford, 2013) 307 ('There is a case to be made ... for the recognition of a responsibility of environmental stewardship as an inherent attribute of property entitlements in English Law.').

For the most part, however, the legal response to environmental damage primarily comes not through reforming property law but through public, regulatory law. However, debates about property are relevant to public law reform (and vice versa). Ideas about property impact on what regulation may be able to achieve. These ideas shape our understandings of the relative importance to be attached to private rights and public responsibilities and shape the way in which this balance or calibration is undertaken, for example whether it is thought necessary, or preferable, to compensate owners for the loss of their rights, or otherwise what degree of respect and protection we feel the rights holder is entitled to.

Liberal or entitlement approaches typically focus on what are argued to be core rights (for example, of use, access and alienation) that are said to inhere in property. By contrast, stewardship approaches typically stress the extent to which outward-looking obligations inhere in private ownership. For some, the essence of a stewardship approach entails certain restrictions on land use (or access) in the wider public interest: essentially, a restraint model of stewardship. Others stress that stewardship also entails the owing to others or to the natural world of property law duties which may entail future-looking positive management obligations.²⁹ Even identifying a central core of what stewardship means, then, can be challenging. To reduce the meaning to one which stresses regard for others (and for the environment) makes for a very general core at the heart of what stewardship seems to entail. However, for present purposes it is sufficient to identify responsibility with respect to property as core.³⁰

... BUT PERIPHERAL PROBLEMS

Beyond this core there are peripheral, and more problematic, aspects of stewardship. These divide into (i) baseline issues (what is the benchmark for stewardship?); (ii) whether stewardship arises from, or can attach to, voluntary actions; and (iii) financial issues, relating to whether compensation for loss of rights, or payment for environmental benefits, is made, and whether this matters.

Baseline issues

It is easier to say that stewardship entails other-regarding behaviour, or to say that a specific legal development evidences stewardship, than it is to say more precisely what stewardship ought to entail. Surprisingly, few have engaged in any depth with this issue in relation to environmental protection, though Rodgers' work is an important exception.³¹ Rodgers has recently written about the challenges in using regulatory law to define property rights, drawing on examples in relation to agri-environmental and nature conservation law. As he notes, many of the regulatory laws which operate in this area provide only for transient obligations, often by agreement and in practice often subject to fluctuations in agricultural market prices which influence the extent to which such schemes are taken up, and hence provide a problematic basis on which to argue for a fundamental reordering of property rights. Rodgers' preferred solution is to distil baselines from these – such as 'good agricultural practice' – which then form a minimum environmental-regarding duty in property law.³² In earlier work, however, Rodgers explores

29 See Rodgers, above n. 6 at 551.

30 M. Shephard, paper presented at the workshop 'Economic Rights and Regulatory Regimes: Is There Still a 'Right' to Water?', Wolfson College, University of Oxford, 19 March 2013 ('responsibility to care for property').

31 As is Shephard's, see, for example, M. Shephard and P. Martin, 'The Multiple Meanings and Practical Problems with Making a Duty of Care Work for Stewardship in Agriculture' (2009) 6 *Macquarie Journal of International & Comparative Environmental Law* 191.

32 See Rodgers, above n. 28 at 306–310. A similar approach is taken by Shephard and Norer, above n. 12.

the difficulties with this reference level for stewardship, noting that they have ‘several weaknesses, of both a theoretical and practical nature’, including local and regional variation, and tensions between historically accepted best practices and those demanded by current knowledge.³³ National experience in relation to water pollution, for example, shows some of the problems of using a ‘good practice’ standard in relation to the water environment, with good practice being removed as a straight defence to a water pollution charge.³⁴ And, of course, any baseline with respect to water abstraction could not be based on agricultural practice but would need to be more general – a general environmental land use standard.

Is non-voluntary, in rem action essential?

It is notable that the national agri-environmental schemes under which landowners are, through voluntarily entered into agreements, paid to provide certain kinds of environmental benefits – in effect, payment for ecosystem services – are known as ‘Environmental Stewardship’ schemes.³⁵ Although this can be discounted as just a similarity of terminology, for Gray and Gray, these schemes are evidence of the shift towards conceiving of property as stewardship, based on notions of civic obligation.³⁶

There are, however, two particular sticking points with this kind of example of stewardship. First, it is not clear how a voluntarily entered into economic incentive scheme can illustrate ‘stewardship’ as this is understood as a duty-imposing concept. Second, the example of the ‘Environmental Stewardship’ scheme is problematic because it is essentially a personal rather than a property-based matter; payments are made to those with a broad range of interests in land, including licences (meaning that land managers are eligible to receive payments directly, not just owners), and agreements do not run with the land. That said, it must be recognised that the notion of stewardship, and stewardship in practice, cannot be limited only to obligations compelled by law. This is because even a stewardship approach to property entails both rights and responsibilities, as well as ethical rather than simply legal duties.

Financial issues

There is an increasing use of economic mechanisms to deliver environmental policy goals, including the ‘payment for ecosystem services’ agenda. Typically this approach emphasises both the value of paying for the provision of public, ecological benefits, and the primacy of the land manager as ecological custodian. This approach emphasises that income may be foregone³⁷ and public benefits generated which the public should pay for.

33 C. Rodgers, ‘The Consequences of the New Revision of the CAP on Exploitation and Rural Property’, European Council for Agricultural Law, XXIII European Congress and Colloquium of Agricultural Law, Røros (Norway), 6–10 March 2005, Independent Report, 7.

34 W. Howarth and D. McGillivray, *Water Pollution and Water Quality Law* (Shaw and Sons: Crayford, 2001), 13.5.7.

35 In England, provided for under the Environmental Stewardship (England) Regulations 2005 (SI 2005, No. 621) as amended. The position of the Water Framework Directive and the EU’s rules on farm support and cross-compliance under EU agri-environmental law and policy is an interesting one. At the time of writing both the Council and Parliament have rejected the suggestion that compliance with the WFD should fall within agri-environmental support measures, though this may be more to do with the difficulty of linking farm support to a Directive which does not directly impose burdens on individual landowners but is more targeted at state-level change, not least because the Directive is seen as being unevenly implemented across the EU. Available at: www.eurinco.eu/cap-reforms/farm-council-meeting-in-luxembourg18th-june-12.html.

36 See Gray and Gray, above n. 21 at 113–114.

37 D. Colman, ‘Ethics and Externalities: Agricultural Stewardship and Other Behaviour’ (1994) 45(3) *Journal of Agricultural Economics* 299.

Equally, arguments in favour of stewardship in property law generally include arguments against financial compensation for loss of 'rights', either because the right to determine how land is used must necessarily be already restricted in the wider public interest or, in the case of statutory developments, the legislative reform signals the social, attitudinal shift which justified the rebalancing in the first place.

This issue is most strongly felt through the 'regulatory takings' debate. The issue is more keenly disputed in other jurisdictions,³⁸ but the property protections in the European Convention on Human Rights (ECHR),³⁹ as well as in the common law,⁴⁰ are relevant and may, where regulation exceeds the state's margin of appreciation, be manifestly unreasonable, place a disproportionate burden on individuals and fail to strike a fair balance (compensation being an important aspect of whether a fair balance has been struck between the state and the individual⁴¹), and act to limit regulatory reform. Given the essentially supervisory role of the ECHR regime, however, the threshold for a successful claim is very high.⁴²

Whether compensation is required will depend on the nature of the interference with the property entitlement and the wider circumstances. For Tarlock, water rights, being typically relational rather than absolute, are less likely to engage takings claims.⁴³ This is probably the preferable view only on a narrow doctrinal reading; if looked at more broadly, as Freyfogle has done, we are more likely to see similarities between water rights and other property rights rather than differences,⁴⁴ though even Freyfogle suggests that the relational, community-oriented nature of water rights may be in advance of the general state of property rights.⁴⁵ In terms of water rights, however, the issue is muddled by the fact that, if the right to abstract is removed, the associated property right essentially goes. The position is not, then, similar to regulation of other land uses, such as certain controls on land development, where it can be argued that while a specific land use may be prohibited or controlled, beyond this the right to determine use of the land is generally

38 Especially the US: see, for example, F. L. Michaelman, 'Property, Utility and Fairness: Comments on the Ethical Foundation of "Just Compensation"' (1967) 80 *Harvard Law Review* 1165; W.A. Fischel, *Regulatory Takings: Law, Economics, and Politics* (Harvard University Press: Cambridge, 1998).

39 Especially, under Art. 1 Protocol 1 (A1P1).

40 K. Gray, 'Can Environmental Regulation Constitute a Taking of Property at Common Law?' (2007) 24 *Environmental & Planning Law Journal* 161.

41 One of two central notions of 'fair balance' in human rights law, which is especially important to the application of Art. 1 Protocol 1 on the protection of possessions: see A. Mowbray, 'A Study of the Principle of Fair Balance in the Jurisprudence of the European Court of Human Rights' (2010) 10 *Human Rights Law Review* 289.

42 For a recent example of the UK Supreme Court finding land reform law to be incompatible with the Convention, see *Salveson v Riddell* [2013] UKSC 22. Compare, regarding different provisions of the same legislation where A1P1 was engaged but not breached, *Paired Crofters Ltd v The Scottish Ministers* [2012] CSIH 96.

43 A. D. Tarlock, 'Reconnecting Property Rights to Watersheds', 24 *William and Mary Environmental Law and Policy Review* 67, 80 ('Water law and water-related land law have a long history of limitations on individual use and enjoyment that form the starting point for modern 'takings' issues').

44 Freyfogle, above n. 10 at 1552 ('while water has unique physical features and more obvious interdependencies, property rights in water differ little from property rights in land and other resources. All resource uses are context-dependent ...').

45 Ibid. at 1530 ('water is the most thoroughly advanced form of property, and its model should prove particularly influential ... property law future will be a version of water law present').

not removed.⁴⁶ This shows up some of the limitations of riparian rights, detached as they are from a tangible ‘thing’ over which property is exercised.

A final point on financial issues relates to payment for environmental benefits. One function that a stewardship approach facilitates is in providing a land management reference level. In principle, actions which fall beneath this standard should be subject to the polluter pays principle, with costs being internalised, whereas actions above this level may justify a ‘pay the provider’ approach. This is an attractive, and seemingly principled, distinction. In practice, however, it is subject to the same baseline problems identified above.

STEWARDSHIP AS A PROPERTY AND AS A POLICY TERM

Putting to one side the ethical question of whether it is right to pay people to do good, the three factors just mentioned seem, at the very least, to muddy the waters of the stewardship concept. They are, perhaps, not so peripheral to the stewardship debate but, actually, rather central to our understanding of stewardship as a concept.

One way to help understand these points is to set up two distinct, though related, models of stewardship. On the one hand there is stewardship as a model in property law, and on the other there is stewardship as a policy approach. Making for better stewardship of natural resources can be approached through either route. For example, property rights can be recalibrated by, amongst other things, legislative or judicial realignments, or land can otherwise be subject to techniques to encourage certain land management practices. The former more clearly engages stewardship as a property concept; the latter is more in line with stewardship as a policy approach. Under the policy approach, whether, for example, money is paid out is essentially a policy question, to be decided on the basis of whether doing so would be necessary to influence behaviour and would be good, effective public policy, although this cannot be approached without regard to prevailing social attitudes. Similarly, a voluntary approach can be justified as good policy because of the principle in favour of liberty, and because it is likely to be less of a regulatory burden, but a more mandatory, prescriptive approach may be justified if voluntarism is not effective.⁴⁷

In practice, there is likely to be significant cross-over between these approaches. For instance, cost internalising and paying for positive ecosystem services approaches interrelate because of the difficulties of neatly distinguishing negative and positive externalities.⁴⁸ Of course, neither formal, doctrinal changes to the law nor policy or regulatory reforms occur in a vacuum; both are also propelled by societal, cultural or political shifts.⁴⁹ The broader point is that property rights and regulatory rules co-exist and mutually influence each other.⁵⁰

46 *Trailer and Marina (Leven) Ltd v Secretary of State for the Environment, Food and Rural Affairs* [2004] EWCA Civ 1580. In reality, the matter might be likely to be determined not solely by whether the right to abstract is a property or an administrative right, but the nature of the restriction on the underlying land (see Case C-293/97 *R v Secretary of State for the Environment and Minister of Agriculture, Fisheries and Food, ex parte Standley* [1999] Env LR 801).

47 As, for example, with habitat conservation: see e.g. the changes to Part 2 of the Wildlife and Countryside Act 1981 effected by the Countryside and Rights of Way Act 2000, shifting (in England and Wales) from a voluntaristic to a regulated management approach.

48 J.W. Singer, ‘How Property Norms Construct the Externalities of Ownership’ in G. S. Alexander and E.M. Peñalver (eds), *Property and Community* (Oxford University Press: Oxford, 2010).

49 Lovett, above n. 15, 773–774; Anderson, above n. 16; M.L. Shephard and P. Martin, ‘Social Licence to Irrigate: The Boundary Problem’ (2008) 27(3) *Social Alternatives* 32.

50 See Rodgers, above n. 28 at 306.

What we have, therefore, is both an internal (property) and external (regulatory) dimension to stewardship, though the two are intertwined. On the one hand, the stewardship approach to property seems to provide a certain justification for a provision such as that contained in section 27 of the Water Act 2003, which both restricts property rights and regulatory entitlements in order to prevent serious ecological damage. On the other hand, however, the concept of stewardship is a problematic reference level for determining whether to make the abstractor internalise the cost of the environmental harm it causes or whether to take a 'pay the provider' approach towards public environmental benefits; nor does it determine whether voluntary actions 'count' in terms of stewardship, or address the baseline issue.

PROGRESSING ABSTRACTION CONTROLS

In England and Wales, statutory controls on water abstraction were first introduced in 1965 under the Water Resources Act 1963 and the law is now contained in Part II of the Water Resources Act 1991, which sets out the basic framework of regulatory controls over abstraction and impounding. In essence Part II provides (with some exceptions) that all but relatively minimal abstractions of surface or groundwaters must be done under a licence from what is now the Environment Agency or Natural Resources Wales, which are under general conservation, recreational and supply-related duties.⁵¹ Ever since the 1963 Act, however, existing abstractors have been treated generously, being given permanent licences – 'licences of right' – based on their prior use, on a first come first served basis. Successive enactments modified the rules on water resources – partly to reflect changing awareness of environmental impacts, partly to give effect to EU obligations and partly to reflect increasing demands on water resources⁵² – but without destabilising 'licences of right'.

THE COMMON LAW BACKGROUND

Administrative regulation, then, is now central and it is an offence to breach the terms of a licence or abstract more than minimal quantities without a licence.⁵³ However, regulation has not formally removed the underlying common law rights, so in principle, as a civil matter between riparian owners, common law rights and duties still apply.⁵⁴ Underlying riparian rights, being property law rights, may also engage human rights protections in relation to property. So it is important to outline briefly the common law of water rights.

As a matter of the law on riparian rights, a riparian proprietor is entitled to the 'ordinary' use of the water flowing in the watercourse; this encompasses the reasonable use of water for domestic purposes and for the purposes of watering livestock, even where this interferes with use by a downstream proprietor.⁵⁵ Beyond these ordinary uses, a riparian owner may take water for an 'extraordinary' or 'secondary' use but only to the extent that this does not interfere with the rights of other proprietors above or below. However, the

51 Environment Act 1995, s. 6.

52 P. Sowter and P. Howsam, 'The Water Act 2003 and Sustainable Abstraction' (2008) 19 *Journal of Water Law* 33.

53 Water Resources Act 1991, s. 24.

54 Under Water Act 2003, s.24, introducing Water Resources Act 1991, s. 48A, operating within the scope of an abstraction licence is not in general a defence to a civil action.

55 *Embrey v Owen* (1851) 6 Ex 353 (per Parke B); *Miner v Gilmour* (1859) 12 Moo. PCC 131; *Chasemore v Richards* (1859) 7 HL Cas 349 (per Lord Wensleydale). The case law (and pleadings) prior to *Embrey v Owen* exhibited a high degree of uncertainty about the correct approach to take in civil water rights cases: see Getzler, above n. 10.

use must be reasonable, the purpose for which it is taken must be connected with the abstractor's tenement and the water must be restored to the watercourse substantially undiminished in volume and unaltered in character.⁵⁶ The reasonable use approach did not extend to groundwaters in part because it was considered too difficult to quantify the right because the flow could not be seen.⁵⁷

In relation to surface waters the reasonable use approach was authoritatively settled in *Embrey v Owen*,⁵⁸ but can be traced back to the landmark decision of the Kings Bench in *Mason v Hill*.⁵⁹ This approach – in contrast to a first in time or prior appropriation approach, which had earlier found favour – gave to the courts a greater degree of discretion to strike the balance between competing users of water as a matter of correlative proportionality. At a practical level, this seemed to mean that an existing use would not be required in order to defend one's riparian right, but any claim for damages would require a material and unreasonable invasion of an existing use, the right in effect being split between the usufructuary right to take water, and the right to protect a reasonable taking. This position was authoritatively laid down in *Embrey*, which stressed the extent to which decisions would be matters of degree, so that 'water law ... was left in a state inviting intuitive, ad hoc decision-making'.⁶⁰ It is striking, therefore, that while the common law moved away from prior appropriation, administrative regulation effectively adopted this approach.

REGULATORY REFORM

Returning to administrative regulation, the Water Act 2003 made some important changes to the law on water resources. These were motivated partly by national concerns and partly by the need to implement the EU Water Framework Directive. The passage of the 2003 Act preceded the enactment of the Water Environment (Water Framework Directive) (England and Wales) Regulations 2003 – the principal implementing measure – and makes no mention of the Directive. But it is clear that the Directive played a role in shaping the 2003 Act, though the division between Act and Regulations was messy and unimaginative.

In marking a step towards taking a more comprehensive and more holistic approach to water law and policy, the Water Framework Directive requires water quantity to be regulated and not merely water quality, so that it contributes to 'the provision of the sufficient supply of good quality surface water and groundwater as needed for sustainable, balanced and equitable water use'.⁶¹ More specifically, Article 11 of the Directive requires that, for each river basin, there is a programme of measures addressing various water management issues, including abstraction. Under Article 11(3)(e), each programme of measures must include 'controls over the abstraction of fresh surface water and groundwater, and impoundment of fresh surface water, including a register or registers of water abstractions and a requirement of prior authorisation for abstraction and impoundment'. This is necessary to ensure the aim of achieving the quality objectives of the Directive,

56 W. Howarth and S. Jackson, *Wisdom's Law of Watercourses*, 6th edn (Sweet and Maxwell: London, 2011) 60.

57 *Acton v Blundell* (1843) 152 ER 1223 (Ex Ch); *Chasemore v Richards* (1859) 7 HL Cas 349. This is the case as long as the water does not flow in a defined channel.

58 (1851) 6 Ex 353 (per Parke B).

59 (1833) 5 B & Ad 1 (per Lord Denman).

60 Getzler, above n. 10 at 323.

61 Water Framework Directive, Art. 1.

set out in Article 4 ('good status').⁶² The programme of measures in the river basin plans should have been operational by 22 December 2012. The quality objectives of the Directive are to be achieved by 2015. As a matter of national policy, however, the UK Government terms the 2015 objectives the 'default objectives' of the Directive, but also speaks of the Directive's 'alternative objectives',⁶³ but it is notable that in England and Wales at least, the Environment Agency is advised that it 'should make full use of the alternative objectives. They are an integral part of the [Directive's] objectives and their use should be a normal part of river basin planning'. It is clear that, in practice, implementation is proceeding on the basis of three compliance periods (to 2015, and then for the purposes of 'phased achievement' of the quality objectives, if certain conditions apply, 2015–2021 and 2021–2027), which broadly map on to the schedule of the periodic reviews for the water and sewerage companies. Moreover, there is ambiguity over whether the objective of 'aiming' to achieve good status denotes an obligation of results or of best efforts. The European Commission is not bringing infringement proceedings against states which have implemented the Directive as an obligation of best efforts, though it has been argued that the better interpretation is that the objective is one of results (albeit that even an objective of result is not absolute).⁶⁴

Article 11(3)(e) also requires that: 'These controls shall be periodically reviewed and, where necessary, updated.' Hence, partly to assist in the implementation of the Directive, the Water Act 2003 requires all new abstraction licences to be time limited. However, existing licences of right were unaffected in the sense that they did not become time limited. The intention of government had been that some form of incentive mechanism should be used to encourage licence holders voluntarily to switch from permanent to time-limited licences, though the message was at best mixed – 'Government remains of the view that truly responsible abstractors should have little need of persuasion that voluntary conversion to time-limited licences is an essential ingredient of their environmental credentials'⁶⁵ – had disappeared by 2001⁶⁶ and was formally rejected in 2008.⁶⁷ This seems a rather good example of the ambiguities of stewardship: a lack of clarity both about what the obligation entails and who bears any burden (and also brings into question whether this part of the Directive has been correctly implemented).

In England and Wales it is estimated that about 4 per cent of rivers are failing to support the Water Framework Directive's good ecological status as a result of pressures from over-abstraction.⁶⁸ It is worth noting that agricultural water abstraction amounts to only a

62 Generally on the Directive and its objectives, see Howarth and McGillivray, above n. 34, 5.7–5.10; S. Bell, D. McGillivray and O.W. Pedersen, *Environmental Law*, 8th edn (Oxford University Press: Oxford, 2013) 634–638; S. Boyle, 'The Water Framework Directive: Why is Good Status Proving Such an Elusive Goal?' (2011) *Journal of Water Law* 19; E. Fisher, B. Lange and E. Scotford, *Environmental Law: Text, Cases and Materials* (Oxford University Press: Oxford, 2013) 560–578.

63 See discussion in W. Howarth 'Aspirations and Realities under the Water Framework Directive: Proceduralisation, Participation and Practicalities' (2009) 21 *Journal of Environmental Law* 391, 413. See later River Basin Planning Guidance vol. 2 (Defra 2008), which states that 'a longer term adaptive approach to river basin planning will ultimately be more effective and cost-effective than a more ambitious initial approach given the current state of knowledge'.

64 J. J. H. van Kempen, 'Countering the Obscurity of Obligations in European Environmental Law: An Analysis of Article 4 of the European Water Framework Directive' (2012) 24 *Journal of Environmental Law* 499.

65 Defra, *Taking Water Responsibly* (1999), para. 1.11.

66 Defra, *Tuning Water Taking* (2001).

67 See Sowter and Howsam, above n. 52.

68 Available at: www.environment-agency.gov.uk/business/topics/water/135357.aspx.

little over 1% of total water abstraction compared with energy and household use, though there are significant regional and temporal variations.⁶⁹

An abstraction licence can be changed in two ways. First, it can be changed voluntarily, without compensation. Second, if a voluntary agreement with a licence holder cannot be reached, the Environment Agency may use its powers under section 52 of the Water Resources Act 1991 to propose to vary or revoke the licence. Any variation will include a time limit to the whole of the licence. Where a licence holder objects to a section 52 proposal, the case must be referred to the Secretary of State or Welsh Ministers for a decision. Where the Secretary of State or Welsh Ministers direct variation or revocation of licences, under section 61, this may lead to a claim for compensation.

At one stage, charging was seen as a potential driver of voluntary conversion from permanent to time-limited licences, though this was quickly ruled out. However, charging has also been seen as a mechanism through which compulsory licence changes could be funded. *Tuning Water Taking* (2001) first instructed the Environment Agency to be more innovative in its charges scheme to better incentivise the efficient use of water.⁷⁰ Between 2001 and 2008 there were three rounds of consultation and ‘finely balanced arguments’,⁷¹ with the new schemes eventually being introduced in April 2008.⁷²

Abstraction charging divides into application charges and advertising administration charges (fixed charges) and annual charges (made up of standard charges and compensation charges). Under the standard charge, the Environment Agency or Natural Resources Wales recovers its costs of managing water abstractions and regulating abstractions, proportional to the impact of that licence on water resources; the compensation charge adds an amount to the standard charge for the recovery of compensation costs associated with the revocation or variation of licences. Annual charges are calculated from factors which take into account the volume of the licensed abstraction (not the actual volume abstracted), and the source, season, and degree of expected water loss, together with a standard unit charge (SUC) for the applicable region and an environmental improvement unit charge (EUIC).

The EUIC is, in principle, to recover the costs of compensation payments paid under the Environment Agency’s Restoring Sustainable Abstraction (RSA) programme, which provides a mechanism for licences to be removed where an abstraction is causing environmental damage. RSA is a non-statutory process and applies to sites designated under the EU’s nature conservation Directives⁷³ and Sites of Special Scientific Interest (SSSIs)⁷⁴ as well as sites identified as part of the national Biodiversity Action Plan process and certain locally important sites. Of these, only review of licences in respect of Natura 2000 sites is strictly necessary in terms of specific legal obligations, the process being termed ‘review of consents’. Licences may be varied or revoked but, as a straight application of the Water Resources Act 1991, compensation is paid. ‘Review of consents’ was to have been concluded by 2010, but remains ongoing. (The 2012 deadline for section 27 to take effect can be seen as helpful to abstractors wanting the compensatory ‘review

69 House of Commons Environment Food and Rural Affairs Committee, *The Water White Paper*, Second Report of Session 2012–13, HC 374, Ev 20.

70 Defra, above n. 66 at para. 2.3.6.

71 Environment Agency, Third Consultation (2007), cited in Sowter and Howsam, above n. 52.

72 The latest version is Environment Agency, *Abstraction Charges Scheme 2012/13*.

73 That is, under the Wild Birds (2009/147/EC) and Habitats and Species (92/43/EEC) Directives.

74 Designated under Part 2 of the Wildlife and Countryside Act 1981.

of consents' process to be completed before the non-compensatory section 27 regime became effective.)

The basic idea, then, is that charging is used to incentivise behavioural change towards more efficient and less environmentally harmful water use. In practice, however, this does not seem to be happening, because the EIUC has not accumulated sufficient funds. Only a very small number of licences – out of around 20,000⁷⁵ – have been reformed on a compulsory basis since the Restoring Sustainable Abstraction programme was introduced in 1999. The process has essentially stalled⁷⁶ and has been described as 'clearly unsatisfactory and ... causing ongoing and severe damage to the environment'.⁷⁷

For the future, the current Water Bill envisages that the price review process, under which the privatised water and sewerage companies' prices and investment decisions are determined for five-year periods, will be used to fund sustainable abstraction schemes. To help drive this, water companies will not be compensated for withdrawal or variation of licences, in effect applying the thinking behind section 27 to all water company abstractions. In parallel, non-legislative initiatives such as OFWAT's voluntary Abstraction Incentive Mechanism⁷⁸ will be rolled out. The longer term may see more general reform of abstraction licensing.

SECTION 27 OF THE WATER ACT 2003

Section 27 removes the right to compensation where an abstraction licence, which was granted before 1 April 2006 and which is not time limited, is varied or revoked, as directed by the Secretary of State or Welsh Ministers on or after 15 July 2012, to protect the water environment (as broadly defined) from serious damage. An amendment to apply this provision to time-limited licences as well was rejected as it was thought that it would remove an incentive for licence holders to convert to time-limited licences.⁷⁹ Although section 27 only refers to the role of the Secretary of State, in reality section 27 is the end point of a process that begins with a search for voluntary licence change, and cases will only be referred to the Secretary of State if the licence holder formally objects to a compulsory licence change.⁸⁰

According to the Regulatory Impact Assessment for what became the Water Act 2003, section 27:

should encourage greater consideration of the environmental impact of abstraction by all abstractors and may encourage the voluntary conversion of licences to time-limited status. ... The

75 The figure for the total number of licences is taken from Environment Agency, *Water resources in England and Wales - Current state and future pressures* (2008), p. 9. The changes made by the Water Act 2003, under which small (<20 cubic metres/day) abstractions are no longer required to be licensed, reduced the number of licences by around a half, to around 20,000.

76 Sowter and Howsam, above n. 52; House of Commons EFRA Committee, above n. 69, para. 15. WWF-UK, Parliamentary Briefing, *Water Abstraction Reform*, March 2013, available at: http://assets.wwf.org.uk/downloads/abstraction_reform_briefing.pdf, puts the figure at 8. The Environment Agency, as at April 2013, states that 21 compulsory changes have been made: see www.environment-agency.gov.uk/business/topics/water/135367.aspx.

77 House of Commons EFRA Committee, *ibid.* at para. 18.

78 OFWAT, *Future Price Limits – Statement of Principles* (2012).

79 HL Deb, 12 June 2003, col. 444.

80 Environment Agency, *Serious damage from abstraction (Section 27 of the Water Act 2003)*, Operational Instruction 1473_12, 23 November 2012, p. 2.

payment of compensation to those who cause damage to the environment is clearly inconsistent with the polluter pays principle, and this measure seeks to remove that inconsistency.⁸¹

Section 27 does not define 'serious damage', prompting concerns about legal uncertainty.⁸² Interpretive guidance, which indicates that the term includes potential or risk of serious damage, uses three principles under which the qualitative nature of the damage, the extent and magnitude of the damage, and whether the damage is reversible and how long recovery may take, are to be established. All three principles are to be considered 'and the weight of evidence across all three must be used to determine the final conclusion. It may not be necessary for all three to be assessed individually as not serious to conclude that there is not serious damage. Similarly, it is not necessary for all three to be assessed as serious for it to be classified as serious damage'. The final decision 'will be determined on a case by case basis taking into account the weight of evidence across all three principles'⁸³ and illustrative examples are given.

In some respects, this is a process akin to the interpretation of similarly subjective environmental law concepts such as 'significance',⁸⁴ 'significant harm'⁸⁵ or 'significant adverse effects'.⁸⁶ Such terms often raise difficulties because of differences of opinion over whether they connote harm (or potential harm) which is more than trivial (i.e. not insignificant), or whether a greater level of harm is indicated; the same term – such as 'significant' – may mean different things depending on, for example, whether it is a trigger for heightened scrutiny in decision-making (as in environmental impact assessment) or a threshold for substantive limitations on, or liabilities in relation to, land use (as with contaminated land). Concepts such as these also raise the problem of how much they are matters of law or a matter of decision-maker discretion.⁸⁷ They also raise empirical issues – how do they operate in practice? In principle, the contaminated land provisions impose liability rules on those who cause contamination which leads to 'significant harm'. In practice, they act as market signals and influence development control decisions.⁸⁸ So their impact on property rights is somewhat different from what might have been envisaged. A finding of 'significant environmental effects' under the Directive on environmental impact assessment triggers procedural, rather than substantive, consequences.

The point at which, e.g., significance or seriousness is to be determined – is this having regard to mitigation measures or not? – also matters. Where an abstraction licence appears to be causing serious environmental damage the Environment Agency's Operational Instruction is clear that the matter has to proceed on the basis of investigation of options to mitigate the problem:

81 Water Bill – Regulatory Impact Assessment, Environmental and Equal Treatment Appraisals, February 2003.

82 Baroness Byford, *Hansard* HL vol. 645, col. 972 (6 March 2003) ('[the Water Bill] introduces sweeping powers and uses language, such as "significant" and "serious", which give lawyers field days').

83 Environment Agency, above n. 80 at 5.

84 E.g. in relation to assessment under the EU Directive on Environmental Impact Assessment (2011/92/EU).

85 E.g. in relation to contaminated land under Part 2A Environmental Protection Act 1990.

86 E.g. in relation to environmental damage for the purposes of the EU Environmental Liability Directive (2004/35/EU) (defining environmental damage as including 'significant adverse effects' on waters covered by the Water Framework Directive, and to protected species and habitats (Art. 2(1)).

87 A long-running issue has been the meaning and reviewability of 'significance' in relation to environmental impact assessment, on which see most recently *R (Loader) v Secretary of State for Communities and Local Government* [2012] EWCA Civ 869. For a broader analysis see J. Holder, *Environmental Assessment: The Regulation of Decision-Making* (Oxford University Press: Oxford, 2004), Ch. 4.

88 See, for example, S. Vaughan, 'The Contaminated Land Regime: Still Suitable for Use?' (2010) JPEL 142.

Before reaching a decision on the need for a licence change, you must carry out detailed investigations and consider possible options to balance the needs of the environment and water users. If investigations show that a licence needs to be changed, you should talk to the licence holder about this change, discuss possible alternative options and explore the best way for this to happen. Where there is an abstraction issue, you need to decide whether this represents serious damage.⁸⁹

Cases will proceed, then, by trying to negotiate a voluntary variation (and in an extreme case, revocation) to the licence (which would not entail compensation), and only if this is not successful to look to use section 27. Guidance suggests that discretion may be needed as a matter of deciding relative priorities.⁹⁰

SECTION 27 AND STEWARDSHIP

What might section 27 have to say about water rights and stewardship? Since it has yet to be used,⁹¹ there are obviously certain limits to any analysis. Nevertheless, although in a sense they are all regulatory in nature and hence related, there are specific interpretive, and wider regulatory and economic, factors surrounding this provision which can inform such an analysis.

INTERPRETIVE FACTORS

First, whether section 27 is used is ultimately dependent upon the Secretary of State being 'satisfied' that this is 'necessary'. This form of wording is clearly less qualified than some environmental remediation provisions,⁹² but it is also somewhat less than an automatic public law duty, which could have been cast as requiring, if serious damage is occurring, variation or revocation to prevent such damage.⁹³ Part of the intention, as evidenced by guidance, is to allow the Environment Agency or Natural Resources Wales discretion to use the threat of section 27 to reach a negotiated solution with abstractors before the matter is referred to the Secretary of State, but equally the Secretary of State also has some degree of discretion in deciding whether to serve a direction to the Agency or Natural Resources Wales to vary or revoke because he or she could be satisfied that ongoing negotiations meant that it was not 'necessary' to serve.

Second, there is vagueness about whether the use of section 27 should be driven by Water Framework Directive implementation. As noted, the 2012 deadline speaks of implementing Article 11(3)(e) of the Directive concerning abstraction by the deadline for programmes of measures to be operative, but the 2003 Act is wholly silent about the Directive. Although section 27 could, it seems, be used either to give effect to the Directive or just for national reasons, the lack of clarity, both of section 27 and the guidance, further complicates matters.

89 See Environment Agency, above n. 80 at 3. The implication is that voluntary changes would be pursued to begin with.

90 Ibid. ('Licence changes that meet the criteria of serious damage must be prioritised to deliver environmental benefits to the most damaged, or at risk, sites quickly.')

91 Environment Agency, pers. comm., 15 March 2013.

92 Such as those in Part 2A of the Environmental Protection Act 1990 concerning the service of contaminated land remediation notices: see s. 78(E). On the various limitations to serving a remediation notice, including where the appropriate person has agreed to undertake voluntary remediation (s. 78H(5)(b)), see Bell, McGillivray and Pedersen, above n. 62 at 601–602.

93 See, for example, the kind of obligation found in relation to abating statutory nuisances under Part III, Environmental Protection Act 1990; *R v Carrick District Council, ex parte Shelley* [1996] Env LR 273.

Third, there is the very ambiguity about what the objectives of the Directive require. Aside from the elimination of priority and priority hazardous substances, where specific rules apply, the general quality objectives of the Directive, and the dates by which these are to be achieved, create a considerable degree of interpretive uncertainty. This may not, in practice, be a barrier to creating innovative forms of stakeholder participation at catchment level and indeed may actually encourage it. But the position may differ when the Directive is used to target specific, rather than general, problems. In this situation, the Directive becomes more akin to command regulation. But the vagueness of the Directive's objectives may in practice limit its application, because of the discretion not to find that, for the purposes of the Directive, there is 'serious damage' (the negative concept of damage not fitting well with the positive concept of good status).

REGULATORY FACTORS

A number of regulatory factors shed light on section 27 from a stewardship perspective.

First, it was noted that the main regulatory forcing function was to incentivise holders of licences of right to convert to time-limited licences, for which the nine years between enactment of the Water Act 2003 and the coming into force of section 27 would seem ample time. But there is no evidence that this has occurred.⁹⁴ Nor is there evidence that section 27 has driven behavioural change in abstractors who might be likely to be caught by its provisions. Notably, the consultation on the implementation of section 27 only opened in February 2012 and closed on 3 May 2012, two months before the provision became operative, whilst the government response and the Environment Agency's Operational Instruction were published in November 2012 – after the section was in force. None of this indicates any official view that providing potentially affected abstractors with more specific guidance on how 'serious damage' would be interpreted for the purposes of section 27 would force behavioural change in the intervening period. The extent to which section 27 will result in what might be termed reflexive recalibration of property rights – by encouraging mitigation action so that its provisions cannot be applied – might also be questioned.

A second regulatory issue concerns shifts in the nature of regulation itself. The relationship between rights (and, for present purposes, also responsibilities) and regulation, however, is also complicated by the distinction between regulation as providing certainty for property and for market transactions⁹⁵ and regulation pursuing non-market objectives such as ecological enhancement, aims which can be pursued simultaneously but whose simultaneous pursuit, in practice, often tends to prioritise legal certainty. In other words, when we assess a measure for its 'stewardshipness' we need to ask whether the measure really advances community-owed obligations or, and to what extent, it pursues market-stabilising, property-protecting, objectives. Much of the wider context, it is suggested, emphasises the latter more than the former. Some, for example, argue that state engineered water markets advance community obligations by trying to provide stability to commercial water transfer.⁹⁶

⁹⁴ See n. 77 above.

⁹⁵ B. Morgan, 'The Intersection of Rights and Regulation: New Directions in Sociolegal Scholarship', in B. Morgan (ed.), *The Intersection of Rights and Regulation: New Directions in Sociolegal Scholarship* (Ashgate: Aldershot, 2008) 18.

⁹⁶ J. Stern, 'Water Rights and Water Trading in England and Wales', FLJS Policy Brief (Oxford: Foundation for Law, Justice and Society. Available at: www.fljs.org/Content/Water-rights-and-water-trading-england-and-wales).

A third regulatory issue relates to human rights law. There is no evidence that the lengthy time period in section 27 becoming operative was motivated by human rights concerns but nor is it an irrelevant factor in terms of striking the fair balance needed under the Convention. It is likely that it would have been in the minds of the legislator because both the seriousness of any losses and the absence of compensation are factors in determining whether a fair balance has been struck, and because of the nature of water rights. As noted, both revocation and variation of a water abstraction licence are more towards the taking end of the spectrum of interference rather than the regulation end because, even if the right is curtailed (varied), it is not as if the right-holder can do anything else with the subject of the right. A variation can be seen as effectively a partial taking, not a limited restriction, which may make the absence of compensation more of a problem in terms of the striking of a fair balance. However, returning to the common law position, the distinction between ordinary and extraordinary use is relevant. As long as the licence is varied down to ordinary use – the unqualified aspect of the right – then there is not likely to be a human rights breach. Variation of an extraordinary use right – and the sorts of cases where section 27 might apply will almost invariably involve such uses – will not require compensation as part of the fair balance test. This links to a further point: that part of the licence which would be varied would be reallocated to the state while the part that had not would remain, in a sense, private property. This illustrates some of the difficulties of drawing any sharp distinction between public and private property and is perhaps illustrative of Gray's notion of 'quasi-public property' which revolves around the notion of private property circumscribed by specific public responsibilities.⁹⁷ The broader point, however, is that human rights factors, whilst never as restrictive of regulation as many fear (or some, in relation to section 27, might like⁹⁸), nevertheless influence the context within which property rights are redrawn.

A final regulatory factor relates to the scientific basis for variation or revocation. While progress has been made under the review of consents process, the knowledge base is greater in relation to such sites. More generally, however, there are acknowledged to be significant limitations in knowledge over the impact of flows on ecology, and both resort to modelling.⁹⁹ Modelling may be an appropriate tool to inform general catchment management but is likely to be less robust as a justification for removing rights without compensation. Such information-deficit problems, as evidenced by the Restoring

97 K. Gray, 'Equitable Property' (1994) *Current Legal Problems* 157, 172–181; S. F. Gray and K. Gray, 'Civil Rights, Civil Wrongs and Quasi-Public Space' (1999) *European Human Rights Law Review* 46. Further examples of quasi-publicness, evidenced through a similar division between rights and responsibilities, can be seen in the restrictions which relate to land designated as an SSSI under the Wildlife and Countryside Act 1981: see Rodgers, above n. 6 at 572 (though preferring the description 'quasi-private' to emphasise that the primacy of use rights lie with the private owner). National controls on development rights also exemplify this.

98 In its response to the Consultation on the interpretation of s. 27, for example, the National Farmers' Union observed: 'This provision has the potential to remove a proprietary right ... from an individual, without the payment of compensation. In our view this is an entirely disproportionate interference with the individual's human rights and we are concerned that this statutory provision is incompatible with the Human Rights Act 1998 (and in particular, with Article 1 of the First Protocol).'

99 M. Acreman and A. Ferguson, 'Environmental Flows and the European Water Framework Directive' (2010) 55(1) *Freshwater Biology* 32; G. Harris and A. Heathwaite, 'Why is Achieving Good Ecological Outcomes in Rivers So Difficult?' (2012) 57(1) *Freshwater Biology* 91 ('Management directives, like the Water Framework Directive, rely on some strong assumptions about our ability to unequivocally link programmes of measures in catchments to ecological outcomes [but] the knowledge base is often not adequate to the task because of poor sample designs and the use of assessment data as an input to predictive models. So, for a range of reasons to do with sampling protocols and models, data adequacy and institutional factors (including assumptions about knowledge, predictability and uncertainty), achieving good ecological outcomes (or demonstrating that this is so) is proving to be a challenge.').

Sustainable Abstraction programme, again serve to limit the likely practical impact of section 27, at least in the short to medium term.

ECONOMIC FACTORS

Some of the points made above in relation to regulation clearly engage economic issues; for example, human rights claims are likely to be about uncompensated economic interests. Beyond this, further economic issues arise. During the transition period (2003–2012), both the ‘review of consents’ process and the Restoring Sustainable Abstraction programme have been ongoing. The latter has not been especially effective because of serious weaknesses in the funding mechanism devised. But the former has seen compensation paid out where designated sites are affected. Both processes, then, have involved compensation for the withdrawal of rights, and the time frames have, to say the least, been advantageous to abstractors holding ‘licences of right’. Hence, many instances of ‘serious damage’ will have been addressed through the payment of compensation before section 27 came into force or, in the case of water companies, dealt with as voluntary changes under section 51 Water Resources Act 1991. The extent to which problematic abstraction rights are likely to have been addressed voluntarily, through compensation, makes it more difficult to argue that the reform in section 27 is evidence in practice of a strong shift towards stewardship.

CONCLUDING DISCUSSION

As a matter of common law, water abstraction is subject to broadly formulated rules of reasonable use aimed at protecting the interests of other potentially affected riparian owners (though not environmental interests if these are not indirectly advanced by private rights). Above minimal levels, however, water abstraction is subject to regulatory controls, though these often undermine riparian rights, bestowing generous regulatory entitlements to existing abstractors essentially aimed at administrative rationing rather than addressing serious environmental harm. So abstraction is subject to responsibilities albeit that these are, in the case of environmental harm, often weakly formulated.

Section 27 of the Water Act 2003, then, is notable for the inroads that it seems intended to make on this broadly liberal legal framework. On its face, it seems to embody a strong, and relatively less contentious, stewardship approach, limiting private rights in a water law context in order to advance important public interests. But it is important to drill down into specific legal provisions, and the context within which they have been enacted and implemented, to assess more fully whether such an assessment is justified.

What the analysis reveals is a complex picture involving a confluence of factors at work, many of which engage the fuzzier aspects of stewardship as a concept. Addressing serious environmental harm may seem to overcome the difficulty of the uncertain baseline, but even this may pose problems because of information deficits, the subjectivity of the standard and the legislative context (including the Water Framework Directive context) within which it sits. While the obligation is binding and not voluntary, the wider context is one where voluntary change is preferred and the legal trigger for the action – whether the Secretary of State is ‘satisfied’ – could have been more strongly formulated. And while the loss of the right is uncompensated, the review of consents process will have compensated many riparian owners during the period before section 27 came into force, and the regulatory aim, although it ultimately failed to deliver, was clearly to use compensatory financial mechanisms more generally during this intervening period.

Taken together, these factors serve to limit section 27 in terms of its scope as an example of the recalibration or reshuffling of water rights from liberal to stewardship approaches. However, it would be wrong to give the impression that section 27 somehow advances a liberal model of property. The example indicates some of the complex ways in which private rights and public interests interact formally and in practice. The private right to abstract water without regard for serious environmental consequences is now subject to legislative control, and this in itself is a significant step in the direction of stewardship. But what if we pose the issue from a different angle and ask: 'Is the abstractor who causes serious environmental harm now subject to environmental stewardship responsibility?' It is suggested that if this were asked today the answer to this might not, for the reasons set out, be so embracing of stewardship.

Of course, section 27 might be re-examined in 10 years' time and found not to have been used directly or to have been used extensively. A different analysis might then need to be written. And water rights law may, in the future, orientate more towards stewardship through, for example, greater reform of abstraction licensing. The present analysis, however, is offered as a counterweight to the uncritical use of doctrinal examples to advance or negate stewardship as an orientating property law concept.

Environmental regulation, like any laws, may, of course, perform an expressive function, advancing social or political views or aspirations, without seeking directly to regulate behaviour or regardless of its enforceability or its actual behavioural impact.¹⁰⁰ Notwithstanding the limitations mentioned above, then, section 27 might be said to perform such an expressive function – sending out the message that it is no longer appropriate to invoke water rights without regard to serious environmental consequences. But we should be a little circumspect before utilising a provision like this to advance claims about stewardship obligations in respect of water rights.

100 C. Sunstein, 'On the Expressive Function of Law' (1996) 5 *East European Constitutional Review* 66 (on law 'making statements' as opposed to directly controlling behaviour).